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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 625

CECIL I. HUST, Petitioner and Plaintiff-Respondent below,

vs.

MOORE-McCORMACK LINES, Inc., Respondent and Defendant-Appellant below.

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

Petitioner submits the following brief in reply to respondent's brief on the merits.

STATEMENT OF THE CASE

1. Lack of Showing of Change in Employment Practices.

In its statement of the case, respondent's brief on the merits takes issue with the following statement made in the petition filed herein:

> "Respondent did not attempt to show in what ways, if any, the actual practice of employing crews and operating ships had changed since before the war, when it would have been clearly liable in such a case, but relied principally upon the terms of the General Agency Agreement." (Petition, page 3.)

Thus respondent states that:

> "The whole effect of the evidence was that the entire shipping of the United States, and employment of crews, had undergone a vital change, namely, one from private operation under peacetime conditions to government operation under war conditions." (Resp. Br. on Merits, page 2.)

Since this conflict brings into focus some of the basic issues of this case, petitioner believes it is most significant to point out that the only evidence relied upon by respondent in its brief in support of its position that the Moore-McCormack Lines, Inc., was not the operator of the ship and the employer of the crew is as follows:

a. *The General Agency Agreement.* (Resp. Br. on Merits, pp. 4-13.) As shown by Petitioner's Brief in support of Petition for Writ of Certiorari (pp. 27-40) (hereinafter referred to as "Petitioner's Opening Brief") and as further demonstrated herein, this agreement is more reasonably susceptible of the construction contended for by petitioners and, in any event, is ineffective of itself to change respondent's liabilities to third persons, including seamen, under the decision of this Court in the case of *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575.

b. *The "Statements of Policy."* (Resp. Br. on Merits, pp. 14-16.) But these statements simply quote Article 3A(d) of the Agency Agreement and are thus no more conclusive than the agreement itself. As shown in Petitioner's Opening Brief (pages 40-43), the fact of the unions' signatures upon these statements cannot be considered as an

indication of their concurrence in respondent's construction of this disputed provision, particularly in view of other provisions of the statement involving the union of which petitioner was a member, as shown below (p. 7).

c. *The "Shipping Articles."* (Resp. Br. on Merits, pp. 16-19.) As also shown herein, these articles for years have been customarily signed between the Master and crew regardless of whether both are employed by the same employer and are in no way conclusive to the effect that the employer of the Master is thereby employer of the crew.

d. *Decisions of the lower courts,* which add nothing new in the way of evidence. (Resp. Br. on Merits, p. 19.)

e. *Public Law 17* (50 U.S.C. Sec. 1291; 57 Stat. 45), which was not enacted until after the injury herein. (Resp. Br. on Merits, p. 25.)

f. *The Internal Revenue Code,* Sec. 1621, U.S. C., Title 26, which was also enacted after the injury herein. (Resp. Br. on Merits, p. 33.)

While it may be true, as urged by respondent, that these various factors, and the Agency Agreement in particular, changed somewhat the legal relationship between the War Shipping Administration and private steamship lines, it is the position of petitioner, as further demonstrated herein, that the private steamship lines were still for all practical purposes the operators of the ships of the American Merchant Marine, at least insofar as their crews were concerned, and it is apparently conceded that the same actual practices continued insofar as employment of crews was concerned.

Petitioner further maintains that insofar as shown by the record of this case, merchant ships were still operated by the private steamship lines according to the same actual practices as under previous Agency Agreements. Respondent has wholly failed to show in what respects these actual practices differed as compared with actual practices under previous Agency Agreements, aside from reference to provisions of the revised Agency Agreement which have been fully analyzed in Petitioner's Opening Brief (pp. 28 to 37); Petitioner's Brief in reply to Respondent's Brief opposing the petition (pp. 3, 4 and 8) (hereinafter called Petitioner's First Reply Brief) and as further demonstrated below (pp. 10 to 18).

Under the "Statements of Policy" also relied upon by respondent, all union agreements were "frozen" and this must be taken as including the employer-employee relationship theretofore existing between the companies and the crews (Dft. Ex. 25; R. 165 to 173 offered R. 130). Actual hiring practices were admittedly continued under Article 3A(d), the only contract provisions referred to in the Statements of Policy. The crew was still paid by the company and issued crew pass cards, etc., by it. (Ptf. Ex. 1, 2; R. 141; offered R. 52-3.) To all outward intents and purposes, the only changes in practice, at least so far as the crew were concerned, even if they knew of Article 3A(d), were that the Master had become an employee of the United States and that the money to pay the crew was to be provided by the United States. Yet, as noted on the Shipping Articles, even the Master gave his address as in care of the Company, and was thus by fair inference one of the Company's regular employees, now also commissioned as an officer in the United States Merchant

Marine. (See Ptf. Ex. 13; R. 142; offered R. 92 and see Stipulation re Ex. 13; R. 176. See also R. 54.)

Nor is it even contended that any changes in operating or employment practices resulted from the Shipping Articles, prepared in the standard form required by statute for many years, or from either Public Law 17 or Section 1621 of the Revenue Code, both enacted after the date of injury in this case.

Thus the actual facts of operation and of employment at that time on ships operated under General Agency Agreements were not substantially different from the facts existing in many other industries vitally essential to the nation's war effort, such as the shipbuilding industry, in which the government assumed a large measure of supervisory control, built and owned plants and also furnished funds to meet payrolls, but in which actual operations were still conducted by private companies, including the employment and direction of personnel, and such companies continued to be responsible to such employees for negligence in such operations, even though the funds to be expended in meeting these obligations were likewise furnished by the government.

2. Continuation of Relationship between Company and Union.

Respondent's brief on the merits (at pages 2 and 3) also takes issue with petitioner's statement that the company and unions continued to negotiate for the settlement of disputes. Thus respondent takes the position that the testimony referred to by petitioner does not show that there ever were any disputes; that any negotiations by respondent would have been in its capacity

as agent; and that any changes in union contracts were to be made not by the agents but by mutual agreement between the W.S.A. and the unions.

While it is true that the testimony referred to does not specifically use the word "disputes," we submit that when the union business agents testified that "We deal directly with the Moore-McCormack Lines" in answer to a question as to whom the union dealt with "with respect to any *questions* that arise as to manning vessels" (R. 103) it is evident that substantially the same meaning was intended.

Moreover, the union agreement covering petitioner shows on its face that disputes arose after April 4, 1942, the date of the Agency Agreement, and that such disputes were settled by negotiations between the union and the company, through its employer's association. See "Emergency Wartime Rules" by memorandum of agreement dated December 31, 1942, between Pacific American Shipowners Association and the Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers' Association. (Ex. 15, p. 64, offered R. 114 and by stipulation not printed, but remaining as part of record. R. 177.) See also pages 35 and 36 of Ex. 15, supra, and Petitioner's Opening Brief, p. 42. For further evidence of disputes between companies and unions and of recognition by federal labor agencies that the steamship companies remained as employers of their crews, see National War Labor Board decisions cited in Petitioner's Opening Brief, page 38.

The obvious answer to respondent's argument that any action taken by the company in any dispute was in its capacity as a General Agent is that such an argu-

ment begs the entire basic question whether a general agent can be responsible as an employer and even though the statement may be true, it does not necessarily follow that the company was not the employer of the crew.

As for respondent's observation that changes in union agreements could only be made by mutual agreement between the W.S.A. and unions, it is significant to note that although the two Statements of Policy referred to by respondent for other unions included such a provision, no such provision was included in the Statement of Policy for the union of which petitioner was a member, namely, the Marine Firemen's Union. On the contrary, this Statement of Policy specifically provided not only that "existing collective bargaining agreements be frozen for the duration of the war," but unlike the other statements for some other unions, provided that:

> "(3) It is understood that all disputes will be settled through the regular machinery now in existence under the collective bargaining agreements between the unions and the steamship operators." (Dft. Ex. 25; R. 168; offered R. 130.)

Thus by agreement between the Union and the War Shipping Administration it was clearly recognized that, regardless of what other unions may have agreed upon, this union and its members, including this petitioner, retained *all* of their rights against private steamship companies and that their agreement, and that any future changes therein were not subject to control by the War Shipping Administration under respondent's theory that the W.S.A. assumed the company's position as employer under the agreement.

EVIDENCE THAT COMPANY WAS EMPLOYER OF CREW

1. The General Agency Agreement.

Respondent here takes its usual position:

> "That Service Agreement is the one which determines the status of the respondent Moore-McCormack Lines, Inc., in this case, and defines its relationship to the vessel. We must look to it, therefore, to determine whether respondent was the employer of the crew on said vessel." (Resp. Br., p. 5.)

Before discussing respondent's detailed analysis of the Agreement, petitioner would point out that once again respondent fails to come to grips with the realities of the principle recognized by this Court that the liability to a workman of a company operating as a general agent of the government cannot be removed by changes in the provisions of the contract between the company and the government. *Brady v. Roosevelt S.S. Co.*, supra, at 583.

Respondent would dismiss the *Brady* case because of certain differences between the facts of the two cases which, as we have previously shown, in no way detract from or limit the application of the principle above-stated to all working men, regardless of the nature of the statutory or common-law basis of liability that would accrue to their benefit but for the provisions of such a contract. (See Pet. Op. Br. 21-7.)

It is also of extreme significance that respondent nowhere discusses or takes issue with petitioner's argument based upon the second principle recognized by this

Court in the *Brady* case that contracts with the government must be construed in the light of the legislation enacted by Congress authorizing their execution, with the result that substantial changes in the rights and duties of government agents to third parties will not be presumed in the absence of an expression by Congress in unambiguous terms. Neither does respondent discuss or take issue with petitioner's argument based upon this principle of the *Brady* case to the effect that under the Merchant Marine Act of 1936 (46 U.S.C. Chapter 27; 49 Stat. 1985) the War Shipping Administration was given no authority to do more than "control the operation . . . and use" of merchant ships and no authority was conferred in any clear or unambiguous terms to do other than to leave the actual physical operation of such ships to private steamship lines, as in the past; and that no authority was conferred by that Act upon the W.S.A. to enter into contracts having the result of divesting such companies of their pre-existing liability to members of the crews of ships assigned to them for operation. (Pet. Op. Br. 22-24.)

Respondent's position, as quoted above, also would minimize, if not ignore, the concept that in determining the status of a party designated by contract as an agent, employer, or independent contractor, insofar as the working-men involved are concerned, the Courts will consider not only the terms of such a contract, but will attach equal, if not greater importance, to actual practices existing between the parties and such workingmen. (See Pet. Op. Br. 40.) Thus the fact that a contract may be carefully drafted to accomplish a given purpose is not conclusive upon the Courts, particularly where, as here, respondent has not shown that any changes were effected in operating or employment practices and the contract was apparently drafted, de-

liberately or otherwise, so as to leave ambiguous the true intent of the parties on the particular points here in issue, a situation not uncommon in the law.

Accordingly, although petitioner does not question respondent's statement that the contract in question was carefully drawn, this is by no means an admission that the contract is to be interpreted in accordance with respondent's views or that its terms, particularly those of Article 3A(d), are clear and unambiguous to that end. This is demonstrated beyond peradventure by the diversity of opinion in the lower courts. Nor is it conceivable that had the unions so understood the intent of these provisions they would have joined in signing Statements of Policy having the effect, as respondent would contend, of signing away their hard-fought rights under the Jones Act against the private steamship lines who were still to procure the crews and to be bound by union collective bargaining agreements.

We thus turn to respondent's analysis of the particular provisions of the Agency Agreement:

Article 1. It is at first obvious that the mere initial use of descriptive terms in the nature of legal conclusions, such as "agent" and "independent contractor," as employed by respondent, is not controlling, even on looking to the contract alone, but that the actual rights and duties elsewhere provided in the contract are the determining factors. Respondent also places emphasis upon the provision that the agent is to manage and conduct the "business" of the vessel, with the inference that it is a word of limitation and does not connote full responsibility as an operator. The word "business" has, however, been defined by this Court to be "a very

comprehensive term and embraces everything about which a person can be engaged" (*Higgins v. Commissioner of Internal Revenue,* 312 U.S. 212, 217). It is thus clear that it involves all matters related to the physical operation of a vessel. This is made further clear, as pointed out in Petitioner's Opening Brief (pp. 28-37), by the responsibilities imposed upon the agent under this contract and the fact that this same Article 1 refers to vessels as having been "*assigned*" to the agent, thus making it clear that physical possession, one of the principal attributes of an "*operator,*" no longer remained with the War Shipping Administration, but passed to the agent.

Article 2. This section likewise refers to "*business,*" as emphasized by respondent, but also to "*assignment*" of the vessels, as well as to their "*acceptance*" by the Agent, making further clear a change in physical possession.

Article 3A(a). Petitioner does not, as counsel suggests, rely upon the term "*maintain*" in this provision, but the terms "*maintain*" and "*maintenance*" in Articles 3A(c), 4(c), and 7, which make it clear that the Agent is under a continuing duty to keep the vessel in a reasonable state of repair, another of the principal attributes and responsibilities of one entrusted with the physical operation of a vessel. Respondent argues that this can have no bearing on the issue of employment. Since, however, it has a bearing on the issue as to whether the Agent was the operator of the ship it also has a bearing upon the issue of employment due to the control over the crew exercised by the operator of a vessel and the importance of such control in determining the issue of employment. Even more direct is the relation of responsibility for "maintenance" of the vessel in a proper state of repair to the

question of responsibility for negligence. In this same connection petitioner would again call attention to the language of Article 14 requiring the Agent to "maintain the vessel in a thoroughly efficient state of repair and condition," again making clear an intent to impose a duty continuing at all times.

Article 3A(c). Respondent here calls attention to the fact that although it is provided that the Agent shall "equip, victual, supply and maintain the vessels," it is not provided that the Agent "*man*" the vessels. While such an omission might be significant in the absence of any other contract provisions dealing with the subject of manning the vessels, we submit that it can have no significance here for the reason that this subject is fully covered, albeit with some ambiguity, in the following provision, Article 3A(d).

Article 3A(d). As previously noted, this article provides that the Agent shall "procure" the crew "through the usual channels and in accordance with customary practices of commercial operators . . ." and shall "make available" such crew to the Master "for engagement by him." To paraphrase respondent, we do not see how the English language could make any plainer the fact that such "procurement" of the crew constituted, for all practicable purposes, the "manning" of the vessel.

Aside from the fact that the word "*procure*" usually has an evil connotation (*United States v. Richmond*, 17 F. (2d) 28, 30), as to procure inmates for a house of prostitution (and aside from petitioner's personal feeling that if respondent's construction of Article 3A(d) be sustained, then seamen have been subjected

to prostitution of another kind by being stripped of basic rights) it is at once apparent that this word is synonymous with the word "*obtain*" (*United States v. Somers,* 164 Fed. 259, 262). Thus the term has been defined to mean "to acquire for oneself." See: *Sisk v. Citizens Ins. Co.* (Ind.) 45 N.E. 804, 805; *Homestead Fire Ins. Co. v. Ison* (Va.) 65 S.E. 463, 465; *Cunningham v. Royal Neighbors of America* (S.D.) 124 N.W. 434, 435; *Kadane v. Clark* (Tex.) 134 S.W. (2d) 448, 456, 459.

Thus it is clear that the word "procure," as used in this agreement, has all the attributes necessary to "manning," since by statute the actual "engagement" of the crews by the Master by the signing of the Shipping Articles has always been a separate transaction and such articles have always been between the Master and crew regardless of who is their employer. (See Pet. Op. Br. 24; Pet. First Rep. Br. p. 5.) In this same connection it is also to be noted that the Statement of Policy signed by petitioner's union, while quoting the above provisions of Article 3A(d) relating to the procurement and engagement of crews, goes on not only to provide for a continuation of the employer-employee relationship between companies and crews, as pointed out above (Supra, p. 7), but also goes on to make direct reference to "*established equitable practices and standards in manning,*" thus making clear any doubt that might otherwise remain as to the synonymous meaning of these terms. (Dft. Ex. 25; R. 167-8; offered R. 130.)

Respondent's points, submitted without argument, that the crew is subject only to orders of the Master and that the Master is the agent and employee of the United States, have been covered by petitioner's previ-

ous briefs, in which it has been pointed out that regardless of who is the operator of a ship or the employer of its Master or crew, the crew is always subject to orders of the Master, and that in giving a particular order, the Master may thus be acting as agent for either of one or more persons. (Pet. Op. Br. pp. 29, 33; Pet. First Reply Brief, pp. 7, 8.) If this were not the case there would be a necessary conflict between the provision of Article 3A(d) giving the Master full control and responsibility not only for the navigation but also for the *management* of the vessel and other provisions of the contract imposing duties upon the General Agent with respect to the management of the vessel, even if such provisions be construed as narrowly as urged by respondent.

Furthermore, as also pointed out previously, it is entirely natural during time of war to expect that the Master of a merchant ship may be commissioned as an officer of the United States for the purpose of seeing that necessary wartime orders and regulations are complied with, while leaving the Master free to act also as the agent for the operating steamship companies in discharging its usual duties of operation and those pursuant to the terms of the Agency Agreement. (Pet. First Reply Br. p. 4.) Even in peace-time, as held by this Court, control of a supervisory nature reserved by the government for protection of a governmental program is not incompatible with the retention of the status of a private enterprise. *Buckstaff Bath House Co. v. McKinley,* 308 U.S. 358, 363; *Federal Compress & Warehouse Co. v. McLean,* 291 U.S. 17, 23.

As for respondent's point that the crew was to be paid with funds provided by the United States, that

fact has no more significance in determining the employer relationship than the fact that the employees of many shipyards during the war were also paid with such funds.

With respect to the remaining provisions of the Agency Agreement and respondent's comments thereon (Resp. Br. pp. 10-13), petitioner is content to stand upon its analysis as stated in Petitioner's Opening Brief (pp. 28 to 37) with the following added comments. Petitioner sees no controlling relationship between the contents of the bills of lading and the making of claims for salvage and the question whether the company was the operator of the ship, particularly since the company was to be reimbursed by the government for any losses. Nor does the fact that the Agent had the duty to "arrange for" repairs, subject to government regulations and control, detract from its continuing responsibility for the maintenance of the ship. The fact that steamship companies, like many other corporations, cooperated with the government without assurance as to the *amount* of "fair and reasonable" compensation, as provided by contract, does not mean that they had no assurance of any compensation at all, even if this point be material, which it is not. Nor does the fact that the company was to be indemnified by the government for claims of all kinds mean that the company was not primarily responsible for payment of such claims. Respondent's again repeated argument based upon the inference that the word "business" is a word of limitation has already been answered. The same is true of respondent's rhetorical questions as to why the agreement was not more specific in revealing its true intent, if the parties had such an intent upon these particular problems.

As for the question why the agreement did not "spell out" in more specific terms, the relationship between the crew, on one hand, and the company and War Shipping Administration, on the other (Resp. Br. on Merits, p. 13), the obvious answer is that this agreement was limited to the relationship between the company and the W.S.A. and that the relationship between the crews and these positions was the subject of separate agreements, to-wit: the collective bargaining contracts between the unions and the companies and the Statements of Policy between the unions and the W.S.A. which, at least in the case of petitioner's union, made very clear the intent that the union members continued to be employees of the company. (See supra, p. 7.)

The remaining point raised by respondent under this issue is to the effect that petitioner has not shown that respondent was the operator of the ship. (Resp. Br. on Merits, p. 12.) It may be, as counsel suggests, that undue emphasis has been placed upon the term "operator," since the more specific issue in this case is whether respondent retained sufficient control over the vessel and its crew to be regarded as their employer and to be responsible for the negligence which was the proximate cause of the accident in this case. As to these basic issues we submit that the evidence introduced, not only as to provisions of the Agency Agreement, but other evidence, such as union contracts, the Statements of Policy and other items of evidence discussed herein, amply support petitioner's position that not only did previous employment practices continue, but that the company remained in substantially the same employer relationship with respect to the union representing this petitioner and with its members, including this petitioner, and also amply sup-

ports petitioner's position that not only was physical possession of the ship transferred to the agent, as under previous Agency Agreements, but that the agent, by assuming responsibility for maintenance of the ship and for other aspects of its operation, remained fully responsible for the negligence involved in this case.

But responsibility as the "operator" of the ship of itself and aside from other evidence carries much weight in determining these basic issues, because of the control and responsibility necessarily involved. Petitioner has thus considered it to be of importance to call attention to the evidence that respondent was the operator of this vessel, although petitioner is under no necessary burden to establish this position. In reply to respondent's challenge on this point, however, petitioner would direct attention to the provisions of Articles 5 and 7 which provide for payment of compensation and reimbursement by the W.S.A. to the General Agent to cover all expenses with certain exceptions, including an exception for expenses "*not* directly and exclusively applicable to the maintenance, management, operation or conduct of the business of the vessels hereunder." Conversely, it is thus explicitly provided that the agent shall be either compensated or reimbursed for all expenses connected with the operation of the vessel, which, we submit, carries with it the clear inference that the General Agent is regarded as operator of the vessels, since otherwise such provisions would be utterly meaningless.

Then follows in Article 7, a specific provision for reimbursement for crew expenditures, including wages, overtime, travel expense, bonuses, maintenance, care, compensation for personal injuries, as required by law, custom, ship's articles, labor agreements or by action

of the Maritime War Emergency Board, making further clear beyond doubt the position of the General Agent as the employer of the crew. The provisions of Article 8 for insurance to be carried by the Agent against marine risks, including claims for personal injury, further support this theory of the case, since, again, such provisions would be meaningless and the cost of premiums wasted unless the Agent were regarded as responsible for the operation of the ship.

In further support of this position petitioner would direct attention to express recognition by the Congress on February 3, 1943, that:

> "The vessels owned by the W.S.A. or under bareboat charter to it *are operated* by experienced steamship companies as general agents for the Administrator." (House Report No. 107, 78th Congress, 1st Session at p. 16; 1943 A.M.C. 606 at p. 617.)

Therefore, even though the Agency Agreement may not more expressly designate the agent as the operator, such is the unescapable conclusion to be drawn from its provisions, as analyzed by petitioner above and in preceeding briefs.

2. The Statement of Policy

Respondent under this heading first avows that it is immaterial whether petitioner knew of the terms of the Agency Agreement or not. (Resp. Br. on Merits, p. 14.) While petitioner recognizes that there are the two lower court decisions cited by respondent in support of that position, it is submitted that the case of *Lewis v. U. S. Navigation Co., Inc.*, 57 F. Supp. 652 at 655 lays down the more sound rule in requiring that such knowledge be brought home to the seamen them-

selves. Moreover, as this Court knows, seamen are re garded as special wards of the Court and that in orde for a steamship company to claim a seaman ha signed away his rights it must affirmatively show tha no advantage has been taken and that the action wa taken with full understanding of his rights. *Garrett v Moore-McCormack Lines,* 317 U.S. 239, 246-8. Of mor importance, petitioner submits that there is a necessar corollary to the rule of this Court as established in th *Brady* case, supra, that a private steamship compan cannot by contract with the government escape liabilit to third persons. That corollary is that in order to bin such persons they must either be a party to such con tracts or at least have not only actual knowledge bu understanding of such contract provisions.

Seemingly recognizing the weakness of its position a above stated, respondent thus retreats to the positio that, in any event, petitioner was given notice of th provisions of the Agency Agreement as the result o publication in the Federal Register and quotation o Article 3A(d) in the "Statements of Policy" and th petitioner's union actually agreed in writing to Artic 3A(d). (Resp. Br. on Merits, pp. 15-16.)

Petitioner has already commented upon the wea ness of this argument. (Pet. Op. Br. pp. 42-3.) Mor over, as pointed out above (supra, p. 7), petitioner union removed any doubt that might otherwise ex as to its understanding and intent in signing its Sta ment of Policy by omitting any provision that chang in union contracts should be made by agreement wi the W.S.A., and instead inserting an explicit provisi that all disputes be settled by and between the uni and the steamship operators, showing clearly that

continued to hold such companies responsible under its agreements as employers of the crews.

3. The Shipping Articles

Respondent calls attention to four points with reference to these Articles (Resp. Br. on Merits, p. 18):

a. That they are between the Master (and not the General Agent) and the crew.

Since, however, Shipping Articles have always customarily and by statute been between the Master and crew, regardless of who is the owner or operator this point has no significance. (See Pet. First Reply Br., pp. 4-5.)

b. That the voyage is to be anywhere that the Master may direct or as ordered by the government.

Here again, it is entirely consistent with petitioner's theory that the steamship companies were responsible as operators of the vessels for the government to retain supervisory control as to destination of voyages, particularly in time of war. (See supra, page 14.)

c. That bonus payments, insurance, wages during internment, and certain other specified matters were to be governed by decision of the Maritime War Emergency Board, a government agency.

It is to be noted, however, that basic conditions of employment, such as wages during voyages, overtime, hours of work, etc., were not mentioned, thus being left presumably to be governed by contract between the companies and unions. Moreover, there is nothing any more inconsistent with the employer relationship to

have such matters governed by the decision of such a Board than for non-maritime employers and employees to be governed as to similar matters during time of war by decisions of the National War Labor Board.

d. That the Shipping Articles plainly indicated that the W.S.A. was the owner and that the respondent company was the agent.

Since, however, it is not the fact of agency but the responsibilities of the agent that are of importance in this case, this point is likewise of no significance.

Having thus disposed of the points raised by respondent under this heading, it follows that they add no further support for the conclusions which respondent would draw from the evidence. (Resp. Br. on Merits, p. 19.) In particular, the conclusions that the United States retained full control of the vessel and that Hust was an employee of the government and not of the General Agent are in no way supported by these points.

4. Decisions of Lower Courts

Respondent cites thirteen decisions of lower courts in other cases purporting to sustain its construction of the General Agency Agreement. (Resp. Br. on Merits, p. 20.) Petitioner submits, however, that all of these decisions are clearly distinguishable from the instant case on one or more of the following points:

a. Although the dates of injuries are not stated in all of these cases, most of them involve injuries which apparently occurred after March 24, 1943, the date on which Public Law 17 was enacted, with resultant changes in the rights and remedies of seamen, as dis-

cussed below, and are thus not controlling for injuries occurring prior to that Act. *Walsh's Case,* 1945 A.M.C. 747; *Ferris v. American South African Line,* 1945 A.M.C. 1296; *Williams v. American Foreign S.S. Corp.,* 1946 A.M.C. 98; *Baker v. Moore-McCormack Lines Inc.,* 57 F. Supp. 207; *Steele v. American South African Line,* 62 F. Supp. Adv. Sh. 636; *McInnis v. United States and General S.S. Co.,* 1945 A.M.C. 1039; *Neilsen v. American President Lines,* 1944 A.M.C. 1169; *Pedersen v. Stockard S.S. Co.,* 1945 A.M.C. 23; *Algiere v. Cosmopolitan Shipping Co.,* 1945 A.M.C. 906.

b. Several of the cases arose by way of libels in admiralty in which the controlling test of responsibility is that of ownership of the vessel, rather than that of the employer-employee relationship, as under the Jones Act. *Walsh's Case,* supra; *Ferris v. American South African Lines,* supra; *Conlon v. Hammond S.S. Corp.,* 55 F.S. 635; *Fox v. Alcoa S.S. Co.,* 143 F. (2d) 667.

c. Although respondent has now collected a total of thirteen lower court decisions in other cases, all were from either New York (Southern District or State Supreme Court) or California, except for *Fox v. Alcoa S.S. Co.,* supra, which held only that no suit could be brought against the government except under terms fixed by it. (See cases as cited Resp. Br. on Merits, p. 20.)

d. In most of the cases it does not appear that the Courts had before them more than the language of the General Agency Agreement and Shipping Articles, and in few, if any, of them does it appear that the Courts had before them or considered other evidence of the employer-employee relationship, as in this case, such as union contracts, testimony and other evidence on

points such as payment of wages, and other features pertinent to establishment of the employer-employee relationship.

In this connection it is to be noted that:

(1) The following cases were disposed of on motion, without submission of testimony: *Murray v. American Export Lines,* 53 F. Supp. 861; *Ferris v. American South African Lines,* supra; *Baker v. Moore-McCormack Lines,* supra; *Steele v. American South African Lines,* supra; *McInnis v. United States and General S.S. Co.,* supra; *Fox v. Alcoa S.S. Co.,* supra; *Neilson v. American President Lines,* supra; *Algiere v. Cosmopolitan Shipping Co.,* supra.

(2) In other cases, although decided after trial, there is nothing to show that the Courts considered more than the contract and Shipping Articles, insofar as the issue of employer-employee relationship was concerned.

Petitioner submits that this last distinction is of primary significance for the reason that where, as here, there was evidence outside the agency contract going to the element of the employer-employee relationship and therefore a proper basis for a determination of that question by a jury, a far different situation is presented than from cases in which this question has been decided as a matter of law solely upon the basis of the pleadings or contract language and apart from other evidence or from a jury verdict upon the basis of such evidence. As well established by this Court, such a verdict may not be set aside on appeal if there is any substantial evidence to support the verdict. *Tennant v. Peoria & Pekin Union R. Co.,* 321 U.S. 29, 35. As previously submitted by petitioner, it is again urged

that in this case there was at least such substantial evidence when one considers the Statement of Policy for petitioner's union, the union contracts, and the other evidence as summarized in Petitioner's Opening Brief. (pp. 40 to 47.)

Although it may be true that at the present time respondent may be able to produce more lower court cases, by numerical count, and although petitioner agrees that such decisions are by no means controlling, it is submitted that those in support of petitioner's position are not only better reasoned but more closely in accord with the decisions of this Court, as in the *Brady* case. These lower court decisions largely speak for themselves, and require only the following added comments to correct what petitioner considers to be mistaken impressions arising from respondent's attempts to distinguish some of these cases. (Resp. Br. on Merits, pp. 24-5.)

Petitioner did not submit the case of *Carroll v. United States,* 133 F. (2d) 690, as controlling, but does submit that it has some bearing on this case for the reason that it held that "the libellant was free to sue the Agency," citing the Jones Act as authority. Id. at 693. The case of *Lewis v. United States Navigation Co.,* 57 F. Supp. 652, which respondent says is in its favor, not only awarded damages to the plaintiff, but recognized that seamen must be afforded a full disclosure of any attempt by a steamship company to limit its liability to the crews of ships operated by it. Respondent states that the case of *Gay v. Pope & Talbot, Inc.,* 1944 A.M.C. 855, "recognizes the propriety of the decision in *Murray v. American Export Lines,* supra, which supports us throughout." It is thus interesting to note that the

only reference in the *Gay* case to the *Murray* case is the following statement:

> "But there the plaintiff conceded . . . that both he (the fellow servant) and plaintiff were employed by the United States . . . and the Court did not determine that Public Law 17 created an exclusive remedy." (Id. at 862.)

Thus the *Gay* case holds only that the *Murray* case simply did not have before it either the crucial issue of whether the seaman was an employee of the General Agent or the issue involving the effect of Public Law 17 upon seamen's rights of suit against General Agents.

In addition to the cases cited in Petitioner's Opening Brief two additional cases have a bearing upon the question whether General Agents are responsible as the operator of ships, although not deciding directly that they are to be regarded as the employers of the crews.

In *Quinn v. Southgate Nelson Corp.*, 121 F. (2d) 190 (CCA 2a) an action for death of a bridge tender under a previous form of General Agency Agreement, it was held that powers reserved to the government did not deprive the company of *de facto* control, pointing out that:

> "The books are full of instances where dual liabilities are not alternatives or mutually exclusive; a plaintiff may be lucky enough to have a two-stringed bow."

In *Moser v. Standard Oil Co. of New Jersey*, 60 F.S. 6 (E.D. Pa.) it was held that a seaman may recover by an action in Admiralty against a General Agent under

the present form of Agency Agreement for the value of clothing lost upon a vessel, thus directly holding that the Agent was the "operator of the ship" and therefore responsible. In *Bruszewski v. Isthmian S.S. Co.*, 1946 A.M.C. 223 (E.D. Pa.) it was held in an action by a longshoreman that the General Agent was the operator and owner *pro hac vice* of the vessel. After a careful analysis of the same form of General Agency Agreement, it was held that:

> "A studied consideration of the provisions of the General Agency Agreement leaving possession and management of the vessel to the defendant gave it such a substantial measure of control over its operation, that the powers reserved to the United States under it were not such as would deprive the defendant of *de facto* control of the vessel, which it seems to me is the criterion to be adopted in making a determination." (Id. at 226.)

5. Public Law 17 and the Internal Revenue Code

In considering the application of Public Law 17, supra, and Section 1621 of the Internal Revenue Code, supra, to this case petitioner again calls attention to the fact that neither of these statutes was enacted until after the date of the injury in this case and thus can have no bearing upon petitioner's rights. This is a matter to be properly determined by the courts upon the basis of the facts of particular cases, rather than by such general observation in the reports of Congressional committees. It is submitted, however, that even when viewed in this limited light Public Law 17 and Section 1621 and the reports of Congress prior to their passage, present a picture not only involving basic contradictions, but one

at variance with established facts, at least in certain important respects.

These legislative reports clearly recognize that the private steamship companies continue to be the operators of the vessels. House Report No. 107 refers to the vessels as "being operated as merchant ships" (p. 3); to "privately operated" ships (p. 3); to insurance coverage for "agent operators" (p. 5); to "full utilization of the . . . operating technique of established private organizations" (p. 14); to the fact that such vessels "are operated by experienced steamship companies" (p. 16); and to the Agent as "the operator of the vessel" (p. 19). (House Report No. 107, 78th Congress, 1st Session.) Although respondent may endeavor to explain these references as "loose," the fact remains that as such operators the private steamship companies retained a large measure of control not eliminated by the fact that some degree of supervisory control by the War Shipping Administration had been superimposed. In view of the importance of control in determining the employer-employee relationship these facts are of particular significance in determining the liability of General Agents under the Jones Act.

It thus appears as a striking paradox that the Congressional Reports should speak in the same breath of merchant seamen as employees of the United States. It may well be argued that this use of the term was equally "loose." Thus added significance must be attached to the reference in both House and Senate reports to the fact that such seamen are only "technically" government employees (House Report No. 107, supra, p. 22; Senate Report No. 62, 78th Congress, 1st Session, p. 5).

Had such seamen become regular government employees in all respects they would, at least prior to Public Law 17, have been entitled to the benefits of the United States Employees Compensation Act (5 U.S.C.A. §751ff) and the Civil Service Retirement Act (5 U.S.C.A. §691ff). The fact that they had been denied the benefits of both of these statutes shows that they were not regarded exclusively as government employees. (See House Report No. 107, supra, p. 2.) On the other hand, at least in many cases (and in this case, as shown below, p. 33) deductions were made under the Social Security Act (42 U.S.C.A. §301ff) for old age and survivor benefits, from the wages of such seamen even prior to Public Law 17, showing that they were still private employees of agent operators, since otherwise such deductions could not have been made. (See House Report No. 107, p. 20.)

It was also conceded by both House and Senate that the W.S.A. had intended, but had not been completely able, to carry out a policy of maintaining *in toto* the peacetime status of seamen relating to compensation for injuries and that seamen were entitled to have such rights maintained. (H. R. 107, supra, p. 15; S. R. 62, supra, p. 5.)

In making a determination of seamen's rights under the Jones Act for the period prior to enactment of Public Law 17 and, in particular, of petitioner's rights in this case, it is submitted that this Court should give primary consideration to the facts of this particular case, including the evidence of control and other features of the employer-employee relationship, and that in considering such facts this Court should bear in mind the following:

a. That seamen have always been regarded as special wards of the Court.

b. That during the war merchant seamen were exposed to great risks, both marine and war risks, and are entitled to have all of their rights preserved.

c. That it is entirely possible for a person to be employed by two employers at the same time but for different purposes.

d. That always in the past seamen were employees of the General Agents.

e. That under the *Brady* case this relationship could be changed only by:

(1) Clear and unambiguous legislation, not present in this case, at least prior to Public Law No. 17, or

(2) Contracts to which seamen were either parties or were given a full understanding of their rights.

f. That under the Statement of Policy signed by petitioner's union it was made clear that the union members retained *all* contractual rights against the private steamship lines.

g. That the right of trial by jury has always been regarded as "part and parcel" of seamen's rights under the Employers Liability Act and Jones Act. *Bailey v. Central Vermont Railway, Inc.*, 319 U.S. 350, 354, and that reference to the "modification" of this right by Public Law No. 17 (House Report No. 107, p. 21), makes clear that it continued to exist at least up to the enactment of that statute.

COMMENTS ON RESPONDENT'S REMARKS UPON PETITIONER'S BRIEF

1. The Brady Case. (Resp. Br. on Merits, p. 33.)

Respondent again attacks this case as "different from the present case in almost every respect." Petitioner submits that there can be no escape from the application to this case of the two basic principles established by this Court in the *Brady* case, supra, at 581 and 583, and referred to so frequently by petitioner as to make further quotation unnecessary. (See Pet. First Reply Br., p. 9.)

2. Petitioner's Claim That the Agent Was the Operator. (Resp. Br. on Merits, p. 34.)

This claim has been so fully documented above and and in previous briefs as to require no further elaboration to meet respondent's attempted denial. (Pet. Op. Br., pp. 28-32, 51-53; Pet. First Reply Br., p. 3; supra, pp. 11 to 18, 25 to 27.)

3. National War Labor Board and National Labor Relations Board Cases. (Resp. Br. on Merits, p. 36.)

As previously pointed out, the two principal federal war-time agencies with jurisdiction over labor problems apparently joined in the conclusion that under General Agency Agreements the companies continued to be employers of the crews. Respondent's sole argument on this point is to expand somewhat the argument in its brief in opposition to the petition (p. 11) to the effect that the relationship of employer and employee before the National War Labor Board and National Labor Relations Board is *sui generis* and has nothing

to do with the "conventional" or "natural" relationship required under the Jones Act, citing *N.L.R.B. v. Hearst*, 322 U.S. 111. This conclusion is, we submit, wholly without foundation, for the reasons stated in Petitioner's First Reply Brief (pp. 10-11). In addition to War Labor Board decisions previously cited petitioner would also call attention to the case of *In re Maritime Cases*, Case No. 111-16640-D et al, 17 L.R.R. 39, decided Aug. 31, 1945, to which proceedings this petitioner was a party.

4. Collective Bargaining Agreements. (Resp. Br. on Merits, p. 37.)

Petitioner has pointed out that not only were the collective bargaining agreements previously existing between the steamship operators and unions "frozen" for the duration of the war but that after the present General Agency Agreement of April 4, 1942, the companies and unions continued to negotiate further agreements. (Pet. Op. Br., pp. 40-43.) Respondent argues that the inclusion in the Statements of Policy of Article 3A(d) "completely negatives" the contention that these facts are further evidence of a continuation of the employer-employee relationship previously existing between the parties. Not only does this argument completely beg the question by assuming the correctness of respondent's construction of Article 3A(d), but in addition, as pointed out above (supra, p. 7), the Statement of Policy for petitioner's union omitted any provision that future changes in union contracts were to be made by agreement with the W.S.A., but specifically provided that all future disputes be handled through the regular and existing machinery under union agreements between companies and unions. (See R.

168.) That such was actually done is proved beyond doubt by supplemental agreements negotiated between the companies and union (See Ex. 15, pp. 35 and 64; offered R. 114, by agreement of counsel not printed, but remaining as part of the record, R. 177). In addition, later union agreements arising from cases decided by directive order of the National War Labor Board in which the steamship companies and unions were the sole parties provided, among other things, that the right of discharge by the general agents should not be impaired (Sec. 3 of directive order); spoke of recognition by the operators of the union "as the representatives of *their* licensed engine room officers for purposes of collective bargaining" (Sec. 1(a)); and provided for insurance to protect the general agent. (Sec. 4.) *Atlantic & Gulf Coast Agents and Pacific American Assn.*, 16 W.L.R. 24, Case No. 111-4932-D. Thus petitioner maintains the correctness of his previous position that there was nothing in the Statement of Policy signed by his union to indicate that the W.S.A. was to be substituted for the companies as the employer under the union contract.

These same facts also constitute an answer to respondent's suggestion that only wages and working conditions were frozen, with the inference that other contract rights were not continued. Moreover, the testimony of Mr. Warwick, relied on by respondent, speaks not only of freezing wages and working conditions, but of "collective bargaining agreements," indicating again that *all* contract rights were to be continued. (R. 102, 103.) The same is made clear by the letter from Edward Macauley, Assistant to the Administrator, of the W.S.A. to Joseph Curran, President, National Maritime Union of America. (Dft. Ex. 25; R. 169-170; offered R. 130.)

5. Payment of Wages—Deduction for Social Security Taxes. (Resp. Br. on Merits, p. 39.)

The only point under this heading requiring further comment is respondent's statement that deductions for social security taxes show nothing because the company was merely acting as agent for the government under provisions of the agreement requiring it to pay the crew in the customary manner, subject to reimbursement by the government.

If, however, crew members were employees of the government, as urged by respondent, no such deductions could have been legally made, since the Social Security Act (42 U.S.C. Sec. 301 ff.; 49 Stat. 620 ff), specifically provides that government employees are not subject to its provisions. (Sec. 1011(b)(6).) In this connection it is to be noted that under Article 7 of the Agency Agreement it is provided that the agent shall be reimbursed for any social security taxes which the agent is or may be required to pay on behalf of the crew to complete the payments into the Social Security fund. (R. 156.) Since, however, there could be no legal disbursement or deduction by the W.S.A. for social security taxes upon its own employees, the act of making deductions for social security taxes shows a construction by the agent itself of Article 7 and a recognition that it is the employer of the crew. See *Buckstaff Bath House Co. v. McKinley,* 308 U.S. 358, 363.

6. Crew Pass and Muster Cards. (Resp. Br. on Merits, p. 40.)

Respondent would draw the inference that the reason why these cards, as well as the pay envelopes, have

the name of the company was that they were probably accumulated stationery. This, however, was an inference which only the jury was competent to draw and it reached a contrary conclusion on the employer-employee issue, based on all of the evidence.

7. **Withholding Tax Forms.** (Resp. Br. on Merits, p. 40.)

No further comments. (See Pet. Op. Br. p. 45.)

8. **Correspondence Between Company and W.S.A. and with Petitioner.** (Resp. Br. on Merits, pp. 41-2.)

Petitioner submits that respondent's argument on this point is fully answered in Petitioner's Opening Brief (pp. 45-7) and would add only one further comment. After respondent and the W.S.A. had exchanged correspondence (which petitioner submits as evidence of a construction by the parties of the General Agency Agreement that it was intended for the agent to assume liability for all marine risks, including the accident in question) the respondent wrote to petitioner, inclosing a copy of the W.S.A. letter, and requested that he submit the amount of his claim to the company so that it could discuss the matter with its underwriters. (Ptf. Ex. 17; R. 145; offered, R. 129.)

Thus respondent not only again failed to notify petitioner of its position that he was an employee of the W.S.A. and that his sole remedy was against the government (See *Lewis* case, supra), but by requesting him to submit his claim to the company thereby represented to petitioner that it had assumed responsibility for his claim. Under respondent's present theory

of the case, no suit could be filed until the claim was "administratively disallowed." (Resp. Br. on Merits, p. 27.) The only regulations for the filing of such claims with the W.S.A. for approval or disallowance do not provide that they may be filed with the general agents, but require that they be filed with the Chief Adjuster of the W.S.A. in New York City. (General Order 32, Section 304.25, 8 Fed. Reg. No. 81, p. 5414, issued April 22, 1943.) Thus the request of respondent that petitioner submit his claim to the company can only be construed as an admission that it was the responsible party.

EVIDENCE OF NEGLIGENCE

Respondent's arguments on this issue are substantially the same as made in respondent's brief in opposition to the petition (pp. 8-10), and are thus fully answered in petitioner's first reply brief (pp. 6-8).

CONCLUSION

Respondent's final request, after urging that the evidence is so overwhelming as to justify setting aside the jury verdict, is to ask again that its duties and responsibilities be determined in accordance with the Agency Agreement. (Resp. Br. on Merits, pp. 46-7.)

As for the weight and sufficiency of the evidence, petitioner can only repeat that a competent jury has rendered a verdict for plaintiff after answering in the affirmative a specific interrogatory going to the existence of the employer-employee relationship (R. 137). Petitioner also again submits that the record of this case and the evidence as discussed in petitioner's briefs, including not only provisions of the Agency Agreement, but those of the Statement of Policy for petitioner's

union, and the collective bargaining agreements, as well as the evidence concerning payment of wages, employment practices and correspondence regarding liability, when combined with an absence of any showing by respondent, outside of the Agency Agreement, of any actual changes in employment or operating practices, constitutes more than substantial evidence to support this verdict.

As for the Agency Agreement itself, crewmen are nowhere described as employees of the government and the express designation of the Master as such an employee, when considered in the light of the principle of *expressio unius est exclusio alterius* and provisions for a continuance of customary employment practices for the crews shows that there was no such intent. On the other hand, the agreement provides clearly that physical possession and custody of the vessel was transferred to the general agent and, as demonstrated by petitioner, provides also that the agent is not to be a mere dock-side bookkeeper, as respondent would contend, but was to assume responsibility for the management, maintenance and operation of the vessel and, as such, was responsible as employer of its crew as well as for negligence in its operation.

Even if it be conceded that there be any doubt as to these conclusions, which petitioner most emphatically denies, it is submitted again that this Court should resolve any such doubt in favor of the rights of this seaman in view of the principles of the *Brady* and *Lewis* cases to the effect that basic rights of seamen cannot be destroyed by agreement between steamship companies and the government, at least without full notice to and understanding by the seamen involved, and in view of

the historic position of merchant seamen as wards of the Courts and of the recognized basic right of trial by jury of which all seamen similarly situated would be deprived if respondent's position be sustained in this case.

The decision of the Oregon Supreme Court should be reversed, thereby affirming the decision of the trial judge and jury in this case.

Respectfully submitted,

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